



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

April 6, 2000

MEMORANDUM

SUBJECT: Delinquent Accounts Receivable: Interim Guidance on the Referral Process and Timing for Collection of Delinquent Debts Arising under Superfund Judicial or Administrative Settlements

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TO: Superfund Legal Branch Chiefs, Regions I - X
Superfund Program Branch Chiefs, Regions I - X
Comptrollers, Regions I - X

One of the Superfund enforcement program's continuing highest priorities for FY 2000 is to improve its fiscal management of the Superfund program. Thanks to your hard work in preparing and issuing Superfund future response cost bills to settling parties, the Agency has improved its management of the program by issuing bills in a timely manner. The Superfund enforcement program's next step is to focus on collecting its outstanding accounts receivable.¹

To further EPA's collection efforts of these outstanding accounts receivable, the Office of the Chief Financial Officer, Office of General Counsel, and Office of Enforcement and Compliance Assurance have worked with the Department of Justice ("DOJ") to issue this interim guidance on referring these accounts. Where appropriate, all delinquent accounts receivable arising under Superfund judicial settlements and administrative settlements arising under Section 122 of CERCLA, should be referred to DOJ for enforcement and collection.² Overall, priority

¹ On July 26, 1999, we issued a memorandum entitled "Superfund Accounts Receivable Collections" which requested that each Region "clean up" their outstanding Superfund accounts receivable.

² This interim guidance amends that part of the July 26, 1999 memo (identified in fn. #1) which stated that, in general, delinquent accounts receivable arising under Superfund administrative settlements should be referred to the U.S. Department of Treasury ("Treasury") for collection.

for addressing the backlog of these overdue accounts receivable should focus on the larger dollar value accounts with a likelihood of recovery.

Collection and referral procedures will vary depending on the basis for establishing the accounts receivable (*e.g.*, judicial settlement). Therefore, this memorandum is organized by judicial settlements and administrative actions, and is further subdivided into accounts receivable established for: 1) a sum certain identified in a settlement; or 2) a future response cost bill sent to the settling parties after the settlement is entered.³

A. Delinquent Superfund Accounts Receivable Arising from *Judicial Settlements*

When a consent decree is negotiated pre-filing of the complaint, EPA refers the underlying claim simultaneously with the settlement to the Environment and Natural Resources Division (“ENRD”) of DOJ for lodging with the appropriate court. ENRD files the complaint, which triggers the jurisdiction of the court, and simultaneously lodges the consent decree. After notice and an opportunity for public comment, ENRD moves for entry of the consent decree by the court. Consent decrees also can be negotiated, lodged and entered in cases that are already pending in court and over which the court has existing jurisdiction.

1. Accounts receivable based on a sum certain due on a date certain

Based on a Memorandum of Understanding between EPA and DOJ, and subsequent discussions, payments of sums certain made pursuant to a consent decree go directly to the appropriate United States Attorney’s Office Financial Litigation Unit (“FLU”).⁴ For a judicial instrument that identifies a specific amount (“sum certain”), such as a past cost payment, which is due by a specific date (“date certain”), a delinquency on a scheduled payment will trigger enforcement and collection efforts by the FLU without further notice from EPA. The FLU tracks all judicial sum certain/date certain accounts receivable based on dates and amounts specified in the entered consent decree.⁵

³ When a Region is aware of a bankruptcy, it should use its normal proof of claim referral rather than the procedures set forth in this memorandum.

⁴ See “Memorandum of Understanding Between the United States Environmental Protection Agency and the United States Department of Justice on Procedures for Remittance of Superfund Debts through the Department of Justice Lockbox System,” February 13, 1992 (“MOU”). In cases where the delinquent receivable was established prior to the MOU, the Region should review the language of the consent decree to see if payment was to be made to the EPA lockbox. If the payment was to be sent to the EPA lockbox, then the Region should call one of the Headquarters contacts identified at the end of this memorandum for assistance.

⁵ To determine the collection status of a particular Judicial sum certain receivable, a Region may contact the appropriate FLU. A directory of all FLUs is attached to this guidance (*See* Attachment 1).

2. Accounts receivable based on a future response cost bill

For consent decrees having future response cost reimbursement provisions (*i.e.*, where a sum certain is not identified in the settlement for payment on a date certain), a receivable is created when EPA establishes the amount due and prepares and sends a bill to the settling parties. EPA's bill for collection will include the following:

- Amount owed by the settling party and the payment due date
- Documentation supporting EPA's bill (documentation should be limited by the terms agreed to in the consent decree)
- Procedures and requirements, as specified in the consent decree, for making payment and for disputing all or part of the costs contained in the bill, which typically include a requirement to deposit any disputed amounts into an interest-bearing escrow account and pay undisputed amounts to EPA
- Notice of the provisions of the consent decree for penalties and accrual of interest due to noncompliance with the terms of decree, and
- Notice that noncompliance will result in further collection efforts, including the referral of the debt to DOJ.

Each Region should do a monthly review of the status of its accounts receivable to determine if an account is overdue. If the settling party has not paid its bill or "properly"⁶ invoked the dispute resolution provision within the time period provided in the consent decree, then the Region should, within fifteen (15) days of determining an account is overdue, issue a "Notice of Non-Compliance with Payment Provision" ("Notice") letter to the settling party (*See* model Notice, Attachment 2).⁷ The Notice, among other things, should advise the settling party that payment is due immediately and that the Region will refer any delinquent amounts to DOJ for collection if not paid within thirty (30) days from the date of the Notice.⁸ If payment is not received by the due date identified in the Notice, then the Region should refer the debt to DOJ-ENRD within thirty (30) days thereafter.⁹

⁶ To properly invoke dispute resolution, a settling party must follow the procedures stated in the agreement, including paying any undisputed amounts and placing any disputed amounts into an escrow account if required. If the party fails to follow the procedures in the agreement, then the Region should issue a Notice of Non-Compliance letter.

⁷ The model Notice letter modifies the Superfund collections process by replacing the three dunning letters prescribed by Chapter 14, Superfund Accounts Receivable and Billings, RMDS 2550D (referencing Chapter 9, Receivables and Billings, RMDS 2540 and more specifically, ¶ 9(b)(1) of that Chapter).

⁸ When a settling party claims it has an inability to pay the debt, the Region should immediately issue a request pursuant to CERCLA Section 104(e)(2)(C) for financial information and determine the collectibility of the debt. The Region should evaluate this information prior to referring the debt to DOJ-ENRD for collection. If the party fails to respond to the Section 104(e) request, the Region should refer the case to DOJ-ENRD for collection within thirty (30) days from the date the party's response to the Section 104(e) request was due.

⁹ An outline is attached that identifies the information required by DOJ-ENRD for referring a debt arising under a consent decree (*See* Attachment 3).

3. Dispute resolution

When a settling party properly invokes the dispute resolution provision under the consent decree, the consent decree's terms will control how much time and the manner in which the parties have to dispute an issue.¹⁰ The administrative dispute process usually includes a period of informal negotiations followed by a period of formal negotiations that ends when EPA issues a final administrative decision.¹¹ Typically, a settling party will have the right to appeal EPA's decision to district court. Where EPA decides that the settling party remains obligated to pay any or all of the disputed costs, and the party neither pays the amounts due nor appeals the decision, the Region should refer the debt to DOJ-ENRD for collection within thirty (30) days after the payment due date provided in the final decision.

Although consent decrees may vary on how long the dispute resolution process may take (*i.e.*, from the beginning of informal negotiations to when EPA issues its final decision), EPA's goal is to complete the process within ninety (90) days of its initiation. If a settling party appeals EPA's final administrative decision to the district court, the Region and DOJ-ENRD will coordinate any follow-up efforts on the petition. EPA's final decision should articulate its decision on the merits and also incorporate language from the model "Notice" letter to avoid having to send a subsequent "Notice" if payment is not received. In general, the final decision should include:

- The resolution of the dispute
- The amount of money owed (*e.g.*, principal, interest, penalties)
- The date payment is due, and
- A statement that the matter will be considered delinquent and referred to DOJ for collection if not paid by the payment due date provided in the final decision or not properly appealed (if provided by the terms of the consent decree).

B. Delinquent Superfund Accounts Receivable Arising from *Administrative Actions*

1. Delinquent administrative debts arising under Section 122(h) of CERCLA

Nearly all administrative settlements will involve the payment of some category of costs (either costs incurred in overseeing settling party work, or past costs, or both). While many of these settlements may not explicitly reference the basis for settling and recovering such costs, EPA's authority is generally derived from Section 122(h).

¹⁰ Unless the Region is confident that the dispute will be resolved, it should notify DOJ-ENRD of the pending dispute.

¹¹ Prior to adjusting any amounts due, other than for an accounting error, Regions should consult the "Revisions to OECA Concurrence and Consultation Requirements for CERCLA Case and Policy Areas" (commonly known as the "Roles Memo"), issued on September 30, 1998, to determine whether consultation with, or prior written approval of, Headquarters is necessary. The Roles Memo has an attached summary chart, which is updated periodically to incorporate any changes to Headquarters review requirements created by subsequently issued memoranda.

Section 122(h)(3) expressly requires EPA to refer claims for non-payment under a Section 122(h) agreement to the Attorney General for civil action “to recover the amount of such claim, plus costs, attorneys' fees, and interest from the date of the settlement.” Section 122(h)(3) further provides that “[i]n such an action, the terms of the settlement shall not be subject to [judicial] review.”¹²

Examples of accounts receivable that may be established pursuant to Section 122(h) authority include: payments arising from a Section 122(h) “past cost” or “cashout” agreement or administrative order on consent (“AOC”); future response cost payments (*e.g.*, oversight) arising from AOCs for removal actions issued under the authority of Section 122; or an AOC with a “past cost payment” provision and a “future response cost payment” provision.

a. Accounts receivable based on a sum certain that is due on a date certain

When an administrative settlement that relies upon Section 122(h) authority has identified a sum certain which is due and payable on a date certain, the Region should issue a late payment Notice (*See* Attachment 2) within fifteen (15) days after the settling party’s failure to comply with the terms of the settlement. The Notice, among other things, should advise the settling party that payment is due immediately and that the delinquent debt will be forwarded to DOJ for collection if not paid within thirty (30) days from the date of the Notice.¹³ If payment is not received by the due date identified in the Notice, then the Region should refer the debt within thirty (30) days thereafter. Regions should refer these debts as follows:

- For overdue accounts receivable where the principal amount is equal to or less than \$1,000,000 (exclusive of interest, costs, or penalties), the debt should be referred to DOJ’s National Central Intake Facility (“NCIF”)¹⁴ who will forward it on to the appropriate FLU, and
- For overdue accounts receivable where the principal amount is over \$1,000,000, the debt should be referred to DOJ-ENRD.¹⁵

¹² Collection of many debts owed to the government is governed by the Debt Collection Improvement Act of 1996 (“DCIA”), which provides for the referral of debts to Treasury. Because of the specific language in Section 122(h), however, referral of debts arising under that section to Treasury for further administrative collection, pursuant to the DCIA, is not required.

¹³ Regions should follow the procedures outlined in fn. #8 for parties claiming an inability to pay.

¹⁴ NCIF’s address is in the attached FLU directory. For debts of not more than \$1 million, please use the attached Model Cover Letter (*See* Attachment 4) and Claims Collection Litigation Report with accompanying instructions (*See* Attachment 5).

¹⁵ For debts over \$1 million, please use the outline of referral requirements for administrative actions (*See* Attachment 3).

b. Accounts receivable based on a future response cost bill

For administrative settlements having future response cost reimbursement provisions (*i.e.*, where a sum certain is not identified in the settlement for payment on a date certain), a receivable is created when EPA establishes the amount due and prepares and sends a bill to a settling party. EPA's bill for collection will include the following:

- Amount owed by the settling party and payment due date
- Documentation supporting EPA's bill (documentation should be limited by the terms agreed to in the settlement)
- Procedures and requirements, as specified in the administrative settlement, for making payment and for disputing all or part of the costs contained in the bill, which typically include a requirement to deposit any disputed amounts into an interest-bearing escrow account
- Notice of the provisions of the settlement for penalties and accrual of interest due to noncompliance with the settlement, and
- Notice that noncompliance will result in further collection efforts, including the referral of the debt to DOJ.

Each Region should do a monthly review of the status of its accounts receivable to determine if an account is overdue. If the settling party has not paid its bill or properly invoked the dispute resolution provision (*See* fn. #8) within the time period provided, then the Region should, within fifteen (15) days of determining an account is overdue, issue a Notice letter to the settling party (*see* Attachment 2).¹⁶ The Notice should advise the settling party that payment is due immediately and that the Region will refer any delinquent amounts to DOJ for enforcement and collection within thirty (30) days after the date of the Notice. If payment is not received by the due date identified in the Notice, then the Region should refer the debt to DOJ-ENRD within thirty (30) days thereafter.¹⁷

c. Dispute resolution

When a Settling party properly invokes the dispute resolution provision under an administrative settlement, the terms of the settlement will control how long the parties have to dispute an issue. Where EPA's final decision requires the settling party to pay any or all of the disputed costs, and the party does not pay the amounts due, the Region should refer the debt to DOJ-ENRD for collection within thirty (30) days after the payment due date provided in the final decision. As noted in section A, paragraph 3 above, EPA's final decision should incorporate language from the model "Notice" letter. Also, EPA's goal (similar to disputes arising under consent decrees) is to complete the dispute resolution process within ninety (90) days of its initiation.

¹⁶ As stated earlier (*See* fn. #7), the Notice letter replaces the three dunning letters used previously.

¹⁷ An outline is attached that identifies the information required by DOJ-ENRD for referring a debt arising under an administrative action (*See* Attachment 3).

2. Delinquent administrative debts arising under other authorities

Generally, Regions should refer overdue accounts receivable arising under Section 122(g) administrative *de minimis* agreements for collection. Section 122(g)(4) provides that, “[t]he district court for the district in which the release or threatened release occurs may enforce any such administrative order.” Such overdue accounts receivable should be referred to DOJ-ENRD for collection after a late payment Notice has been sent, *i.e.*, Regions should follow the same referral procedure for *de minimis* agreements that is followed for Section 122(h) sum certain, date certain settlements as set forth in Section B(1)(a). For guidance concerning the referral of claims arising under unilateral administrative orders (“UAOs”) or prospective purchaser agreements (“PPA”), please contact the Regional Support Division (“RSD”) staff named below.

Regional Financial Management Offices (“FMO”) should continue to work closely with their counsel, program and enforcement counterparts to ensure the proper disposition of delinquent Superfund accounts receivable. FMOs should immediately advise the Office of Regional Counsel (“ORC”) when a receivable becomes delinquent and request that the assigned ORC staff initiate action to resolve the outstanding debt.¹⁸

This memorandum is intended solely for the guidance of employees of EPA. It is not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States of America. EPA reserves the right to act at variance with this document and to change it at any time without public notice.

If you have any questions about this interim guidance, please contact Ben Lammie (202-564-7126) or David Dowton (202-564-4228) of RSD, or Vince Velez (202-564-4972) of FMD.

Attachments

cc: Financial Management Officers, Regions I - X
Barry Breen, Director, OSRE
Susan Bromm, Deputy Director, OSRE
Paul Connor, Acting Director, PPEd
Bruce S. Gelber, Principal Deputy Chief, Environmental Enforcement Section, DOJ
David R. Lloyd, Assistant General Counsel and Claims Officer, OGC
Earl C. Salo, Assistant General Counsel, OGC

¹⁸ RSD, the Financial Management Division (“FMD”), and the Office of General Counsel will continue to work on efficiencies in the collection process with DOJ and, where appropriate, Treasury.